UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555(JMP)

Adv. Case No. 08-01420(JMP)(SIPA)

- -x

In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.,

Debtors.

- -x

SECURITIES INVESTOR PROTECTION CORPORATION,

Plaintiff,

-against-

LEHMAN BROTHERS INC.,

Debtor.

- -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

April 14, 2010

10:03 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

HEARING re Order to Establish a Procedure to Unseal the Examiner's Report, to Establish a Briefing Schedule to Resolve Remaining Confidentiality Issues, and to Establish a Procedure to Provide Access to Documents Cited in the Examiner's Report [Docket No. 7530]

CLAIMS STATUS CONFERENCE

HEARING re Motion of LSF6 Mercury REO Investments Trust Series 2008-1 for Relief from the Automatic Stay [Docket No. 7832]

HEARING re Motion of Lehman Brothers Holdings Inc. for Authorization and Approval of Certain Settlements with the Internal Revenue Service [Docket No. 7734]

HEARING re Debtors' Motion for Approval of a Settlement Agreement with Metavante Corporation [Docket No. 7780]

HEARING re Motion of Mizuho Corporate Bank, Ltd., as Agent, on Behalf of Itself and Certain Lenders, Seeking Authority to Assign Certain Interests in a Credit Agreement [Docket No. 7903]

HEARING re Debtors' Motion for an Order Enforcing the Automatic Stay Against and Compelling Payment of Post-Petition Funds by Swedbank AB [Docket No. 6734]

HEARING re Debtors' Objection to Proof of Claim filed by Latshaw Drilling Company, LLC [Docket No. 6729]

HEARING re Debtors' Motion Authorizing the Debtors to Implement Claims Hearing Procedures and Alternative Dispute Resolution Procedures [Docket No. 7581]

Transcribed by: Clara Rubin

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P R O C E E D I N G S

THE COURT: Be seated, please.

Mr. Waisman, good morning.

MR. WAISMAN: Good morning, Your Honor. Shai Waisman, Weil, Gotshal & Manges, for the debtors. Your Honor, a lengthy agenda which was updated by an amended -- a second amended agenda that was filed on the docket this morning, although, I think, a relatively short hearing.

We would start on page 2 of the agenda, and the first matter on the agenda relates to the examiner. And I believe the examiner and his counsel are present in court today, and I think they would address this matter.

THE COURT: Okay. Fine.

MR. BYMAN: Good morning, Your Honor. We are here for what I hope is -- excuse me, a frog in my throat -- what he hope is the last logistic obstacle to having our report finally and fully open. We've had one objection from the CME. CME's counsel is here. And before I respond, perhaps you'd like to speak to them, or I can just tell you what our view is.

THE COURT: Well, I guess I'd like to hear more about the waiver issue from counsel for CME and whether or not this isn't a game-ender issue and, if it's not, why not.

MR. BYMAN: I don't mean to speak for the CME, but I can tell you that I did have a conversation with them yesterday. They concur that the waiver issue means that we can

disclose the parties. It's the link between the parties and the specific bids that they still object to.

And I don't mean to step on your argument, so if you want to do that directly.

THE COURT: Why don't I hear from counsel for the --

MR. BYMAN: I'll be back.

THE COURT: -- CME.

MS. DUNSKY: Good morning, Your Honor. My name's Lisa Dunsky. I'm in-house counsel at CME Group, which is the parent company for Chicago Mercantile Exchange.

With respect to the waiver issue, the basis -- I think there were two bases in the examiner's response to our objection that -- where he asserted waiver, and the first was an interview of a CME employee named Tim Door. Mr. Door's interview occurred in October of 2009, before we had produced any documents to the examiner. And during his interview, Mr. Door told the examiner which firms CME had invited to bid in the auction of LBI's house portfolio. We don't have any objection to the examiner making public the names of the firms that were invited to bid.

Mr. Door did not recall any specifics about the bids that were actually submitted, and for that reason, after his interview, the examiner asked us to produce documents with that information, which we did. And it's three of those documents that are the subject of our request to maintain

confidentiality.

So while we do not object to the examiner disclosing the names of the firms that we invited to bid, it's the combination of an actual bid with the name of the firm that submitted the bid that is the basis for our objection. And those documents were produced after Mr. Door's interview.

THE COURT: Why should that be confidential?

MS. DUNSKY: Well, Your Honor, that type of information, which is, you know, not only a bid and offer but who submitted the bid is -- the U.S. futures markets operate on a basis of anonymity with respect to bids and offers and nondisclosure of market participants' positions. That's reflected in sections of the Commodity Exchange Act; it's reflected in CFTC regulations, including CFTC Regulation 1.59 which requires self-regulatory organizations, including CME, to have rules and procedures in place to keep that type of nonpublic information from being disclosed, with some very limited exceptions.

So it's fundamental to the way the futures markets operate that that type of information not be publicly disclosed. But on top of that, and I think this is where you really get to the crux of the harm that we're asserting, this was the first time that CME had to conduct an auction of any clearing members' house or proprietary portfolio. You know, and the examiner in his response says that's not likely to ever

happen again, and we hope that it doesn't, but if it does, whether it's CME or any other clearinghouse or SRO that might need to conduct an auction, it is critical to have multiple qualified bidders who are willing to participate in the auction. That's critical to the auction process itself and its success.

And we're concerned. And the National Futures Association and the Futures Industry Association, in the letters that they submitted to Your Honor, also expressed their grave concerns that disclosing bidder names combined with their actual bids, in addition to being contrary to the nondisclosure provisions that we operate under, also would prevent or discourage at least some potential bidders from participating in an auction in the future if they know that their bids and offers are going to be publicly disclosed at some point in time.

THE COURT: Isn't that pure speculation, though, and the examiner's position is basically that market forces, whatever they may be at the time, will bring parties to the table because of the traditional profit motive; if there is money to be made, people will show up?

MS. DUNSKY: Well, we can't say for sure, you know, what any bidder would or would not do. I can tell you, from our discussions with the bidders at hand here, more than one of them have expressed to us directly that they would not

participate in future auctions if what happens here is that their names in conjunction with their bids are revealed. And the Futures Industry Association, Your Honor, which represents about eighty percent of the participants in our markets, they have stated their belief based on their experience, and this is stated in their letter to you, that it's very likely that revealing this information would discourage at least some bidders from participating. And the NFA, the National Futures Association, which is the SRO for everyone that's registered with the CFTC, they've also expressed the same concern.

So I can't say what will or won't happen in any future auction, but I think there's a high enough likelihood. You know, we believe it, the NFA believes it and the FIA believes it; you combine that with what's the potential benefit of disclosing the information.

The examiner had stated that it's important that the parties know who the bidders were so if they want to file suit they can. We don't disagree with that, which is one of the reasons why we made the examiner's -- these documents available to the examiner but under a confidentiality agreement. All of these documents have also been produced to counsel for Lehman Brothers Inc.'s trustee on a nonredacted basis under a confidentiality agreement. If there are other parties with standing, they can approach us, ask for the documents to be produced, and if they're willing to enter into an appropriate

confidentiality order we'll produce them. But it's the idea of making this information public, including making it available to the bidders' competitors, that we don't see any benefit to, whereas there is potential significant harm not only to CME Group but to the futures markets in general.

THE COURT: Okay. I understand your argument. And I think I should hear from anyone that wishes to support your argument before hearing from the examiner. I have the letters from National Futures Association and from Futures Industry Association; I've read those letters. I don't know if anybody is here to represent the positions of what I'll call industry friends of your position.

Is there anybody here?

MS. DUNSKY: My understanding, Your Honor, is they were not sending representatives today.

THE COURT: Okay. Well, it was a very efficient letter, then, because I read both and I understand their position, and you've also conveyed it today. I'll hear from the examiner.

MS. DUNSKY: Thank you.

MR. BYMAN: Your Honor, the one point on which we have no disagreement is that if there were any competitive sensitive information involved, we would have gladly redacted it and kept it from public view so long as there could be some commercial harm that might befall somebody.

The regulations, the concerns that the FIA, that the NFA and the CME have addressed all go to positions that some trader or market participant might currently have and the disclosure of the fact that they had a position might make it difficult for them to unwind that position. That's not what we're talking about here. We're talking about eighteen months after the fact, long after, presumably, these positions have been unwound, identifying for the public the facts. That's all we're trying to do: Let the sun shine on all of the facts.

And the only facts the public will learn is, for example, the sum, the block sum, of 240 million dollars was paid for some block of interest-rate derivatives. We won't know whether it was a long or a short position; we won't know if it was T-bills or T-bonds or S&Ps; we won't know if it was spreads or futures or options. We won't know anything about the position, based upon what we're planning to do. It's inconceivable that there could be any competitive harm.

And, frankly, in all of our conversations, trying to seek compromise, and there have been many conversations, I repeatedly asked counsel for the CME, explain what the competitive harm is, let me talk to some of these people, the people whose names apparently now we can disclose, we just can't link them to the individual bids, have them explain why this would be of any competitive harm to them, and the answer was that there was no answer. We have not gotten an answer to

that question. And I respectfully submit that, in the absence of that answer being affirmatively provided to you, these documents should be released to the public in their entirety.

THE COURT: Okay. Is there anything that anyone else wishes to say on this subject?

MR. KOBAK: Yes, Your Honor. James Kobak, Hughes Hubbard & Reed, on behalf of the SIPA trustee. The property that's involved here was LBI property. I didn't put -- we didn't put in a paper on this because this isn't a dispute that's ripened yet in our case. But we do -- one of the things we have to report on is whether there are causes of action available to the estate. There certainly is an issue here, even if it's not the CME, as to whether the participants involved who seem to get discounts or payments for taking these positions may be subject to suit by the estate.

I know the examiner tentatively concludes that there may be qualified immunity; we're taking a hard look at that. But at some point we're going to have to issue a report that says we looked at this and we concluded -- if we conclude there is no cause of action, we concluded that because this is what happened and this is the basis for our conclusion. I'm not sure -- and, again, this hasn't really ripened in our case. We did receive documents under confidentiality obligations, but I don't see how we can meaningfully report without identifying what happened and who the recipient was. It's certainly of

interest to people because some of these recipients had other dealings with Lehman. Certainly if we do decide there's a lawsuit, at that point we're going -- the identity of the people who made the bids and what the amounts of the bids were are going to have to be disclosed.

THE COURT: Do I correctly conclude from those remarks that the trustee has not independently investigated the subject of this auction conducted by CME?

MR. KOBAK: No, we are invest -- we're continuing to investigate it. We've actually, I think, gotten documents additional to what the examiner might have had. I think there are interviews that are being conducted now. But we haven't yet taken a position on whether there's a cause of action, but at some point we will be doing that. It is a matter of concern to us. There was quite a lot of LBI money that was involved and securities that were involved in these transactions.

THE COURT: So just to cut to your bottom-line position, you support the examiner's request that these documents be fully released?

MR. KOBAK: Basically, yes, Your Honor. And I wanted to make Your Honor aware that this is also an issue that is almost certain to come up in our case, although it's not ripe right now.

THE COURT: To come up in the sense that whatever I do, these documents may ultimately become public in your case,

or --

MR. KOBAK: Well, we may need -- feel the need to make them public, or at least to make some of the information in the documents public.

THE COURT: Okay. I understand.

MR. KOBAK: Thank you, Your Honor.

THE COURT: Anything more from CME?

MS. DUNSKY: I know you've got a real busy day, and I would just urge the Court to wait until it's ripe. You know, let's see if it's an issue in that case or not. We're certainly doing everything we can to cooperate with LBI's trustee, just as we did with the examiner, but we would make the same objection under the confidentiality agreement that we have with LBI's trustee as we're making here, and we'd like to take the opportunity to do that if that issue becomes ripened in that other case.

THE COURT: Okay. Thank you.

I've looked at the response of the CME Group, the two letters from the National Futures Association and the Futures Industry Association in support of the CME position, and I've considered the papers filed by the examiner and the arguments made today, including the arguments made by the trustee in the SIPA liquidation case. From the Court's perspective, the claims of confidentiality are weak relative to the public's right to know, and the arguments concerning the potential

future harm to events that may never occur involving comparable auctions are so speculative as to be discounted close to zero. The documents should be fully disclosed. The fact that the identity of the bidders has already been disclosed makes this last step in the process a relatively simple one for the Court.

The arguments have all been considered, and disclosure will ensue immediately.

MR. BYMAN: Your Honor, with the Court's permission, we have a draft order on a disk. May I hand it to the clerk?

THE COURT: Please.

MR. BYMAN: And, Your Honor, if I may, could I explain what the logistics will now be? As soon as we can make a phone call, we can begin uploading the unredacted version of the -- of volume 5, which was the only one that currently is redacted. We will also begin the upload of a hyperlinked version of the entire report. I'm told by our technical geeks that it will take five to eight hours to do that, but once that happens, at the same Web site where everybody has been able to access the report now, they will be able to hyperlink to all of the documents.

There will also be a -- on the Web site there will be a link to our outside vendor who will, on request, at cost -- by the way, that's our cost; I think the vendor has some profit built into it. But anybody who wants a hard copy of the report or a disk -- a drive that has the hyperlinked version will be

able to order it directly from them.

But within eight hours at that site, and I can give the URL if somebody wants to hear it now, they will be able to get the full report.

THE COURT: I think on March 11th I described this as a best seller, and apparently you're making it happen.

MR. BYMAN: Hope so.

THE COURT: Okay.

Is there any --

MR. BYMAN: Your Honor, I think the examiner would like to say a few things, if that's all right.

THE COURT: Okay.

MR. VALUKAS: Your Honor, one last item -- housekeeping item. Early on when I was first appointed, we talked about best practices in a discussion here, and I indicated to the Court that we had been requested by the trustee to provide an overview of what we consider to be best practices once the report was concluded. We had a meeting with the trustee and others in Washington last week and provided to them a report in a written form, describing what we perceived to be the best practices growing out of our experience in this matter.

In my understanding, the trustee has been in contact with chambers to see whether the Court wishes to receive that through them; if not, we're prepared to file that with the

Court if the Court still wants to receive the report on what we perceive to be best practices growing out of this experience.

THE COURT: Well, I don't have any personal need to see that, but it occurs to me that it would be of value to the bankruptcy community generally to have access to your conclusions on that subject, and so I encourage you to file it.

MR. VALUKAS: Thank you, Your Honor. We'll follow through.

THE COURT: I do have one question that's potentially out of line, but I'm going to ask it anyway. I was surprised to see a front-page story in yesterday's New York Times about an entity called the Hudson Castle. Candidly, I had never heard of Hudson Castle and knew nothing about its possible connection to the Lehman insolvency. To what extent, if at all, did the examiner consider the role of Hudson Castle? I don't know whether or not that newspaper story is simply designed to sell more newspapers or if it in fact is something that you took into consideration in developing your report.

MR. VALUKAS: Well, we did take into consideration things involving Hudson Capital, including Fenway, which later became important as part of the report. Hudson Capital, to our knowledge, based on our review at that time, had become, as we understood it, independent of Lehman as of 2004; so we did not go back to the history of Hudson Capital to see who or what was involved with Hudson Capital pre-2004. And in looking at where

we were looking at, which is from approximately 2006 forward, we did not consider Hudson Cap -- we viewed it as a separate entity at that point and therefore did not look at it in any particular depth.

THE COURT: Okay.

MR. VALUKAS: We looked at the Fenway situation.

THE COURT: All right. Thank you very much.

MR. VALUKAS: Okay.

THE COURT: Oh, incidentally, the examiner and his counsel are free to stay and they're also free to go.

MR. VALUKAS: Thank you, but I think we'll leave. Thank you, Your Honor.

THE COURT: And that's true for CME as well.

MR. WAISMAN: Apparently there'll be many geeks back at Jenner & Block getting to work momentarily.

THE COURT: I don't think he was saying there were many geeks at Jenner & Block.

MR. BYMAN: As a geek, I took it as a compliment.

MR. WAISMAN: Your Honor, the next item on the agenda is a case conference. In keeping with the loose tradition of the debtors providing updates for the Court on distinct areas of the case on a regular basis, and in the context of the fact that we now have, I think, eight omnibus claims objections on file to procedural motions relating to -- dealing with claims, and the fact that the debtors filed an 8-K on March 29th

relating to claims, to just take a moment, no more than five minutes, updating the Court on where we stand in the population of claims generally, and at least some view as to how the debtors plan on dealing with that claims population going forward at a very high level.

To take Your Honor through that, if I may hand up a copy of the 8-K that was filed, just for the Court's information -- I'm not going to spend any time on that -- as well as -- I think it's three slides that will walk the Court through our approach to claims.

THE COURT: That's fine. Thank you.

MR. WAISMAN: Actually, Your Honor, if I could swap that one out. I think I gave you mine with a few notes.

THE COURT: Well, then there's no need for a report; I'll just read this.

MR. WAISMAN: Thank you.

THE COURT: Thank you.

MR. WAISMAN: So, Your Honor, turning to the first page of the report, past the title page, as Your Honor is aware and has heard, there have been over 66,000 claims filed against the estates, asserting, in face value, over 899 billion dollars of claims. It's important to note that, of these 66,000 claims, over 21,000 of them are unliquidated in their entirety or include unliquidated components. And as I indicated on March 29th, the debtors filed an 8-K to provide further

information to the public regarding the claims that have been asserted.

This presentation, Your Honor, is -- for those that follow the cases closely and compare information that is released, is not going to tie to any information that's currently available or has been previously disclosed. Each report is as of a date certain. This report is as the claims population stood and our best thinking as of about 4:30 this morning. And we continue -- as Your Honor knows, we continue to evaluate the claims to assess the character of claims, the basis for objection. And even this report, as it's being provided to Your Honor, the information on it will continue to change and will certainly change as we become smarter, as we have a greater opportunity to review claims, understand the basis of the asserted claim, and overlay the legal analysis. So those points just by way of caveat.

Turning to page 3 of the report, Your Honor, what we did here is provide a broad categorization of the claims that have been filed and then parsed them out by our review and current approach. So as Your Honor will see, of the 66,000 claims, approximately 300 have already been withdrawn. Pursuant to the 4 omnibus claim objection orders Your Honor has entered, over 1,600 of those claims have already been disallowed. Of the additional 4 omnibus objections that have been filed, another approximately 1,500 claims are subject to

pending objections. And when you take all that into account, we're still left with roughly 63,000 claims asserted against the estate.

On first pass, and, again, very preliminary and definitely going to change as we get smarter and have additional time to review, we believe and have already identified over 10,000 claims for additional objection. And at that time we'd still be left with 52,000 claims against the estate. These numbers will change, as I indicated, and the 52- will be further reduced. As we become smarter, as we have additional objections filed, as we negotiate with counterparties and reach resolution, we will see a decline in the number; the question is what is the scope of the decline.

On page 4, just to give Your Honor a view as to the claims that are currently being reviewed for objection and how they break out in terms of the omnibus objection that would be asserted, amended claims, duplicate claims, insufficient claims and the like, again, we expect -- or our current view is that we have identified over 10,000 additional claims subject to omnibus types of objections.

THE COURT: Okay.

MR. WAISMAN: Finally, Your Honor, on page 5, to give the Court a view towards how we plan on dealing with claims going forward, first and foremost, we have already started the process of engaging claimants in dialogue over their claims.

And the effort here would be to resolve as many claims as we can, subject to the settlement authority granted by this Court, without the need for a claim objection, without the need for ADR, and certainly without the need for litigation.

From there, we will also continue to pursue omnibus objections to claims -- those are the most efficient way to resolve claims -- in particular duplicate claims, amended claims and claims that we believe have no basis for liability, and expunge those without taking up too much of the Court's very busy docket.

Subject to a motion to be heard later on the docket, we would also seek to employ ADR where omnibus objections don't expunge a claim, where we haven't been able to settle a claim, and when we believe we have an objection to a claim but perhaps there's an opportunity to mediate the differences, resolve the differences without great expense to the debtors, the counterparty or the Court's time, and reach resolution through the ADR procedures.

Then there are what I call the outliers, and these are individual claims with unique circumstances that don't -- aren't easily susceptible to an omnibus objection or ADR and where the debtors are required to file a one-off objection to such claim. And I think that the Court has already seen a few of those on the docket, in particular the Latshaw claim which is also on the docket today, and the Schwartzman claim.

And in addition, I think, just to alert Your Honor, we do expect there to be more of the one-off objections; in particular, and I think this has been presented to the Court by way of status conference previously, there are a handful of large derivative claims, very large derivative claims, asserted by big banks. We believe that those claims are highly inflated, to say the least. Efforts to engage those counterparties through work through some common ground and reduce those claims on a mutual basis we don't think have been met with a fair reception, and the debtors intend to shortly file objections to those claims in this court and seek resolution.

In terms of quantity and timing, I think it's fair to say that one of those objections will likely be coming within the next two to three weeks, with another following shortly thereafter, perhaps another two to three weeks, and we believe there'll be a lull in those for some time but perhaps another four to six to follow thereafter. And those are the one-off objections that we know are coming down the pike that we wanted to alert the Court to.

THE COURT: Now, will the ADR procedures that we will be discussing later this morning be applicable to these one-off inflated derivative claim objections that you've just alluded to?

MR. WAISMAN: The ADR procedures, if approved, are

applicable to all claims asserted against the debtors.

THE COURT: Including these, but are you treating these in a different category?

MR. WAISMAN: As they relate to the ADR procedures, we're not treating them in a different category. But I think it's fair to say that these are -- these particular claims are ones where, given the nature of the efforts to engage in meaningful dialogue, which has been, in our view, rebuffed and not met in good faith, these particular small handful of claims are not ones where we believe ADR would be fruitful.

THE COURT: Okay.

MR. WAISMAN: So with that background and the approach to claims, as Your Honor sees, we expect there to be a fair amount activity -- claims activity on the docket, but hopefully not many claims objections requiring the Court's intervention and time for several months to come. Obviously, we'll have to revisit that in a few months as claims activity picks up and work on the plan and confirmation continue.

Happy to answer any questions the Court may have. We just wanted to provide that update.

THE COURT: Thank you. I have no questions.

MR. WAISMAN: On to the uncontested matters on the agenda, Your Honor, agenda item 3 is a motion of LSF6 Mercury REO Investments for relief from the automatic stay, a motion for relief filed against the debtors. It is unopposed by the

debtors. I think we simply ran out of time to stipulate and reach an agreement, but I believe we have an order to hand up to the Court resolving that matter.

THE COURT: Fine.

MR. WAISMAN: Your Honor, the next uncontested matter is the motion Lehman Brothers Holdings for authorization and approval of certain settlements with the Internal Revenue Service. Spend just a moment on this, Your Honor. The motion was filed; objections were due on April 7th. No objections have been filed.

Your Honor, as the motion indicates, LBHI, as the parent of the controlled group, claimed a refund from the IRS for taxes, penalties and deficiency interest for eight disputed tax issues for consolidated returns filed between 1997 and 2008. The amount paid by LBHI previously for these disputes exceeded 374 million in taxes and over 227 million dollars in interest.

As I think the motion makes clear, the facts and issues surrounding the disputes are voluminous, highly complex and technical. As a result, the IRS and the debtors determined some time ago to engage in an administrative process that really is a mediation, and the parties engaged in that mediation over a period of six months. The debtors' team in this regard was led by Jeff Singoli (ph.), who's the managing director of LBHI and director of global tax services for LBHI,

who is the declarant on this motion and is here today in court to answer any questions the Court or parties may have on the issue.

Jeff's team was assisted by their tax counsel, which was led by McKee Nelson, which has since become, through merger, Bingham McCutchen, and in particular the partner leading the engagement, Raj Madan, who is also here in court this morning.

In addition, the debtors had assisting them the firm of Sutherland Asbill, and Sutherland's role was to advise the debtors on the likely outcome of litigation on each of these disputes, as experts in the area, so that it could help guide the debtors in terms of the negotiations and the parameters of settlement.

As part of the mediation, or even in advance of the mediation, and then as part of the mediation, Jeff, his team and Bingham regularly consulted with the creditors' committee and their tax professionals to advise them of the status of the disputes, the nature of the disputes, the possibility for settlement, and then, as the mediation progressed, the status and the give-and-take and ultimately the settlement.

As a result of the mediation and the reason we're here today with this motion is the debtors and the IRS reached agreement on six of the eight disputes. Those settlements are subject to two approvals: Your Honor's approval and the

approval of the U.S. Congress Joint Committee on Taxation.

The issues that have been resolved are, as outlined in the motion: the interest deduction issue; LBIE foreign tax credit issue; Sweet River foreign tax credit issue; the Brazil foreign tax credit issue; the lease buyout issue; and the mark-to-market issue.

Out of the 364 million dollars in tax payments that I alluded to earlier, the disputes we're talking about here relate to approximately 199 million dollars of those payments. Of the 199 that LBHI paid as a result of the settlement of the 6 issues, the estate will receive recovery for 125 million of that 199 million; so a settlement in excess of, I think, 64 percent of the asserted amount.

That leaves two issues of disagreement between the debtors and the Service; one of those issues the parties agreed to continue to mediate on, and the other the parties agreed to discontinue mediation and proceed to litigation.

The debtors, together with their professionals, and with the assistance of the creditors' committee, believe -- have received all of the issues, the settlement, the risk and reward of litigation, and believe these settlements are fair, equitable and in the best interests of these estates.

Happy to answer any questions the Court may have. Otherwise, we would ask that the settlements be approved.

THE COURT: I think I would like to hear from the

creditors' committee in connection with its statement in support of the settlement.

MR. FLECK: Good morning, Your Honor. Evan Fleck of Milbank, Tweed, Hadley & McCloy, on behalf of the official committee.

Your Honor, as set forth in the committee's statement in support of the motion, the committee has given the importance of the tax issues that relate to these estates. The committee has formed a tax subcommittee to focus on the matters in dispute that Mr. Waisman alluded to and that are set forth in detail in the debtors' motion. The subjects that are the subject of the motion and that have been resolved were, in particular, the focus of many discussions among the creditors' committee, members that are on the subcommittee, along with the advisors to the committee, and then in sessions together with the debtors. As a result of those discussions, the committee is comfortable that the proposed settlement of the issues that are the subject of the motion are in the best interests of the estate, reflect a fair resolution of the disputes, and for those reasons the committee supports the debtors' motion to approve the settlement.

THE COURT: Fine.

MR. FLECK: Thank you.

THE COURT: I'll approve the settlement. And I'll resist the urge to have someone from the bench of experts

who've come here to talk about it answer questions or offer anything, because I'm confident I would not understand it.

MR. WAISMAN: I think that applies to the large majority of us in the room today, Your Honor.

Item 5 on the agenda is the Metavante settlement, to be handled by my partner Richard Slack.

MR. KOBAK: Your Honor, if there's nothing further, one other matter on the LBI calendar involving LBI was withdrawn, so I wondered if I might be excused.

THE COURT: Yes, you may be excused.

MR. KOBAK: Thank you, Your Honor.

(Pause)

MR. SLACK: Good morning, Your Honor. Richard Slack from Weil Gotshal, for the debtors.

The motion is one to approve the settlement agreement between LBSF and Metavante Corporation pursuant to Rule 9019. It's been a while since we've had this matter in front of Your Honor. As you know, this -- your opinion was appealed, and during the pendency of the appeal the parties reached a settlement. The matter was remanded by the district court for Your Honor's consideration in the 9019. We filed a 9019; there have been no objections that have been filed in connection with the proposed approval of the settlement.

Typically, Your Honor, we might have filed a certificate of no objection, but here, because of the district

court's order which directed the debtors to have this matter heard at this hearing, just in case Your Honor had any questions about the settlement, we thought it prudent to go forward today instead of filing the certificate.

The debtor believes this is an excellent result for the estate, and we're ready to rest on the papers, unless Your Honor has any questions about the settlement.

THE COURT: I have no questions about the settlement. I've reviewed the papers and am pleased that the parties were able to reach a compromise of their respective positions.

Does Metavante's counsel wish to say anything?

MR. BERNARD: Your Honor, just to make -- for -- just to say thank you for your time. Richard Bernard of Baker Hostetler, on behalf of Metavante and Fidelity National Information Services.

THE COURT: All right.

MR. BERNARD: Thank you, Your Honor.

THE COURT: It's approved.

MR. SLACK: Thank you very much, Your Honor.

THE COURT: And I will advise Judge Rakoff.

(Pause)

MR. WAISMAN: From there, Your Honor, we move to the contested portion of the agenda. The first matter under contested matters is the motion of Mizuho.

(Pause)

MR. PASQUALE: Good morning, Your Honor. Ken Pasquale from Stroock & Stroock & Lavan, for Mizuho Corporate Bank.

Actually, Your Honor, this is a matter that is uncontested as I stand here before you this morning. Mizuho is the agent on a thirty-five billion yen credit facility. The motion that we filed was simply, as an administrative matter, to permit assignments of claims in interest under the credit facility, without the need to go to the debtors for prior consent, which the debtors, under the agreement, are required to give, not to be withheld unreasonably.

We have agreed to some changes in the order to address the debtors' concern. The two changes, and I have a blackline for the Court, are just to make clear that all orders pending in this case apply, in particular the NOL order, and that the debtors reserve their right to object to any claim.

And with that, Your Honor, unless you have questions, I'd ask that the order be entered. I'm happy to present it.

THE COURT: I don't have any questions and I will enter the order.

MR. PASQUALE: Thank you, Your Honor.

THE COURT: Thank you.

MR. PASQUALE: May I approach?

THE COURT: Yes -- well, no, why don't you just give it to debtors' counsel.

MR. PASQUALE: Okay. Will do.

THE COURT: We collect all the orders at the end of the hearing.

MR. PASQUALE: Thank you, Your Honor.

MR. KRASNOW: Good morning, Your Honor. Richard Krasnow, Weil, Gotshal & Manges, for the Chapter 11 debtors.

The next matter on the calendar relates to the debtors' motion concerning Swedbank. Your Honor, by this motion, the debtors are requesting that the Court direct Swedbank to cease and desist from continuing to engage in contumacious conduct which started over a year ago when it withheld post-petition funds aggregating, in Swedish kronor, almost 83 million Swedish kronor, which translates to approximately 11.7 million dollars, which it was improperly seeking to apply against certain pre-petition obligations which it -- or claims, which it asserted it had against LBHI. And we are requesting, therefore, that the Court direct that they pay those monies to LBHI, as they are required to, in our view, under the bankruptcy laws.

Your Honor, the facts relevant to this particular proceeding are limited in number, rather simple and are unrebutted and, thus, conceded by Swedbank. They are as follows, Your Honor. LBHI maintained with Swedbank, prior to the commencement of these Chapter 11 cases, a general deposit account; that account continues in existence subsequent to the commencement of the Chapter 11 cases. There is -- there was

deposited and there is deposited in this account, and I'll use U.S. dollars if I may, Your Honor, in excess of 12 million dollars, of which approximately 11.7 million dollars was deposited post-petition. Your Honor, this is not disputed. It is indeed conceded by Swedbank.

Swedbank is a party to a number of swap agreements with various Lehman affiliates. In connection with those swap agreements, Swedbank asserts that LBHI issued and is -- and guaranteed the obligations of those affiliates. While we reserve our rights with respect to challenging that guarantee, Your Honor, for purposes of today's hearing, we're prepared to acknowledge the existence of the guarantee as a possibility, at a minimum, that LBHI may be indebted to Swedbank in respect of that guarantee.

The claims that Swedbank have asserted against LBHI, in respect of those guarantees relating to the swaps, are in excess of the post-petition funds on deposit in the account. There is no challenge or dispute by Swedbank that if the usual law that applies with respect to setoffs -- as set forth in Section 553, and as Your Honor has ruled in this case in connection with the DnB NOR dispute -- applies, then Swedbank cannot, may not, set off or seek to set off, refuse to return to LBHI the post-petition funds that it holds.

Those, Your Honor, are the facts; they are not disputed by Swedbank.

So what is their rationale for failing to pay over the funds? They contend, Your Honor, that, based upon the safe harbor provisions of the Bankruptcy Code, not only do they have the extraordinary rights that are provided for in the safe harbor provisions with respect to the inapplicability of the automatic stay to effectuate setoffs, to terminate agreements as they relate to the swaps of derivatives which are covered by the safe harbor provisions of the Code, but they are indeed entitled to exercise rights with respect to the general depository account and need not concern themselves with the distinctions long recognized by the courts and by this Court with respect to mutuality and post-petition funds and pre-petition funds.

Your Honor, they cite no cases whatsoever to support their position; they rely solely on what they claim to be the language of Sections 560 and 561 of the Code to support their position. It's unclear to us why they rely on 561, since the transactions at issue are swap agreements and thus 560 would apply, but in fact the language that they quote and that's relevant here, Your Honor, is the same in Section 560 and 561.

And they argue, Your Honor, that those safe harbor provisions not only excuse their failure to have sought any relief from this Court over the past sixteen months or so, as it froze the funds at issue here, but also eliminated any requirements of mutuality that would otherwise apply.

So, Your Honor, we should turn therefore to the applicable language of Section 560. And I'm going to quote, Your Honor, selectively the words that are applicable here, but I'm selecting only those words that in fact apply, because there are many words in those sections. And so what this Section 560 said, it states, quote, "The exercise of any contractual right of any swap participant ... to offset or net out any termination values or payment amounts arising under or in connection with the termination, liquidation, or acceleration of one or more swap agreements shall not be stayed, avoided," et cetera.

Your Honor, we submit that that plain language, clear unambiguous language, means that if there is a payment obligation that the debtor has to a counterparty, or vice versa, which payment amounts or obligations arise or are in connection with the swap agreement itself, then the automatic stay would not apply and the nondebtor party could exercise its setoff rights. We do not dispute that, Your Honor. The problem for Swedbank, however, is that the payment obligation that it has to LBHI that is at issue here has nothing to do with the swap agreements; it has everything to do with the general deposit account, which is totally unrelated to the swap agreements.

If one were to look to Section 561, while it doesn't refer specifically to the swap agreements, although it lists a

number of potential derivative-related transactions, the applicable language that I've just quoted is stated there as well.

So it allows for setoffs, it allows for netting, so long as the obligations of both sides arise under or relate to the derivative contracts with the swaps in question.

Your Honor, we submit that the plain reading of the statute does not support their position. And while they make reference to legislative history, which, we would submit, one need not look to given the plain language of the statute, we submit, as set forth in our responsive papers, that that legislative history similarly simply doesn't support their contention that the safe harbor provisions of the statute, by their words or by Congress' intention, were intended to address this type of situation and allow a counterparty to glom onto, if you will, assets and monies that are property of the debtor-in-possession.

Moreover, Your Honor, even if Section 560 were to apply such that the automatic stay would not apply, the next question is does that mean that safe harbor provisions eliminated/eviscerated the concept of mutuality. There certainly is nothing in Section 560 or 561 that would support that contention.

And indeed Swedbank doesn't argue that those particular provisions directly address the issue. Rather, they

contend that one should look to the 2005 amendments that were made to Section 553, the setoff provision of the Code, and there they say there is support for the argument that mutuality no longer applies as a requirement for setoff when dealing with safe harbor transactions, because of the amendments that were made in Section 553, which has a carve-out as to its applicability with respect to safe harbor transactions. The problem with that argument, Your Honor, is that while Section 553 was indeed amended to provide a carve-out, it was a very limited amendment; it applied with respect to Section to 553(b), which is a section of that statute, that provision, that in all other respects is an avoidance provision, if you will; it allows a debtor-in-possession or trustee to avoid pre-petition setoffs that come within the description of the types of pre-petition setoffs that can be avoided under 553(b). And Congress, without question, amended that section to exclude from the types of pre-petition setoffs that can be avoided those types of setoffs that would otherwise come within the safe harbor provisions.

Well, Your Honor, it is undisputed, it is conceded, that we are not dealing with a pre-petition setoff here. We are dealing with an attempted setoff of post-petition funds. And I would argue, Your Honor, that the fact that Congress only amended Section 553(b) reflects a Congressional intent that in all other respects the rules that apply to setoffs, the

requirement of mutuality, apply to all types of transactions, including those that come within the scope of safe harbor provisions of the statute.

For these reasons, Your Honor, and for the reasons set forth in our reply, we submit that there simply is no foundation whatsoever to the defenses that Swedbank has belatedly put into play in support of its argument that it could withhold the ten million dollars currently due and owing to LBHI. We would request, therefore, that the Court grant the motion and direct that those monies be paid over to us forthwith. Thank you, Your Honor.

THE COURT: Thank you.

Mr. Montgomery, good morning.

MR. MONTGOMERY: Good morning, Your Honor. The debtor is correct about one thing: that the facts in the Teng declarations and the facts in the Stenberg declaration match. There was a small computational difference, and we have advised the debtors that the Teng declaration is correct even as to those computational differences.

It's also not disputed that, from the inception of the case, Swedbank has done everything consistent with its view of how to exercise its rights under the safe harbor rules. It is also unquestioned that we are dealing with both pre- and post-petition deposits in connection with this setoff dispute. It is undisputed that LBHI is a party in two ways with respect to

these agreements: One, LBHI (UK Branch) was a derivative counterparty under one of the swap agreements; and LBHI is a guarantor of all four swap agreements. The four swap agreements involved LBCC, LBFSA and LBSFI, as well as LBHI itself. Those agreements go back to 1996.

This is the result of a very long history in which the parties reached an agreement on how to handle swap transactions using the 1992 master ISDA agreement form; it was used by all four parties. And importantly, in that document the term "setoff" is defined as a specific -- having a specific meaning. And if you may -- if I may, Your Honor, I'm going to quote from the setoff definition contained in the ISDA agreement, which is attached to the Stenberg declaration: "'Set-off' means set-off, offset, combination of accounts, right of retention or withholding or similar right or requirement to which the payer of an amount under Section 6 is entitled or subject (whether arising under this Agreement, another contract, applicable law or otherwise) that is exercised by, or imposed on, such payer."

THE COURT: You're not suggesting, are you, that parties can contractually override applicable provisions of the Bankruptcy Code, are you?

MR. MONTGOMERY: Oh, quite the contrary. I believe the Bankruptcy Code here authorizes what the parties agreed to. And what I'm informing the Court of is what the parties agreed to. The parties agreed that the term "setoff" would allow it,

that is, the party who had a net obligation due it, the right to go after not only what was in the specific trades, called swaps, but in the other accounts of the parties. The general deposit account to which the debtor has made reference, which has existed for some number of years between Swedbank and LBHI (UK Branch), is such another contract entitlement between the parties. It is a general liability of Swedbank to provide UK SEKs on demand for the debtor. That demand deposit account is what was set off.

Now, why am I so confident that the Court should adhere to our view of the reading of 560 and 561? And, by the way, the reason we refer to 561 is these are both master agreements and we are going across contracts, so we thought that 561 was a relevant provision. 561, of necessity, is relevant because we're talking about swaps.

Our starting point for this view might be well-codified by looking at the Enron decision cited by the debtor. In there, Judge Gonzalez says Section 560 simply permits the exercise of termination rights by a nondefaulting swap participant so long as the enforcement of those rights is first triggered by a condition of the kind specified in 365(e)(1). There is no dispute here that the triggering event here was a 365(e)(1) or ipso facto clause provision. There is therefore no disagreement that the dispute here arises under or in connection with a swap agreement. There is no dispute that we

are exercising a contractual right, as defined in that swap agreement or master netting agreement. And it is also true that the debtor is pointing to a constraint on the exercise of our rights, or the bank's rights, by virtue of 553. But it is also undisputed by the parties that the operation of any provision of this title or by any order -- or a court -- excuse me, let me start that again -- by operation of any provision of this title or by any order of a court or administrative agency in any proceeding under this title, cannot constrain the exercise of rights protected by 560 and 561.

So where does this take us, Your Honor? We think Congress said fairly clearly that if an offset arises in connection with a swap agreement whose termination was triggered by an ipso facto clause, the enforcement of the rights under that agreement can be, must be, enforced, and no provision of the Code, no order of the Court, can stop the exercise of those rights.

This is not a situation, as this Court has seen before, in which the parties equivocated as to what their rights were, that they may have engaged in some sort of waiver as to whether or not they did or did not think that they had to come to the Court first. November 27 of 2008, Swedbank advised the debtor that they were going to take a setoff as of December 1 for at least the contract amounts that were owed under the LBHI swap agreement; that is, not going across contracts, but a

straightforward 560 setoff of LBHI's obligations due to Swedbank against Swedbank's obligations to LBHI.

The right to freeze, we believe, is a retention. It is specifically preserved by 560 and 561. It's specifically preserved by the contract.

Now, the debtor says somehow we've missed the issue of mutuality. Well, there's no dispute that Swedbank and LBHI are parties to the swap agreements, there's no dispute that LBHI and Swedbank are parties to the guarantee agreement, and there's no dispute that Swedbank and LBHI are parties to a general deposit agreement.

Therefore, the only reason mutuality comes up is because of the well-established fiction that the debtor changes on the petition date; that is, that the party that comes into existence post-petition is not the same as the party that existed prior to the filing. That's why mutuality doesn't exist when the automatic stay kicks in; that's why there are limitations under 53.

But I say to you, Your Honor, that the mutuality that existed immediately before the filing date continues to exist the minute after the filing date because of 560 and 561, because no provision of the Bankruptcy Code can operate to stay or otherwise impair the enforcement of the rights under that swap agreement. And all of the rights being exercised here are rights coming out of the termination process. This is not a

case where one side went to a state court and tried to adjudicate whether or not there should or should not be a termination. This is not a case in which the parties hesitated, waited two years to decide what their relative positions were, after having engaged in months of settlement with each other. None of these things are the circumstance here. Instead, we have a classic, well-defined, agreed swap agreement whose termination resulted from an ipso facto clause relating to LBHI, the guarantor, and that the rights or setoff, or offset, are codified in the agreement and recognized by the statute.

Your Honor, I think -- we respectfully request that you deny the debtor's request stated in its papers for an order directing us to turn over the frozen funds. We respectively (sic) request that you deny the request to turn over the setoff funds identified in the Teng declaration. And just so the Court is absolutely clear about this, it's the 371,000 dollars that was owed by LBHI under the LBHI swap agreement, not the guarantee, that was asserted against the general deposit account.

Your Honor, I think, for the reasons that I have explained to you, you should deny their request for relief.

THE COURT: I hear you, but I disagree with you. How can you say, with no governing precedent to support your position, that the provisions of 560 and 561 somehow override a

lifetime of jurisprudence on the issue of mutuality under Section 553 of the Bankruptcy Code? You grew up in this; so did I. Mutuality is the holy grail of setoff when it comes to bankruptcy. And you're suggesting without any authority, other than printed language in a form ISDA agreement, that I should disregard that. I need more than just your impassioned argument, Mr. Montgomery.

MR. MONTGOMERY: Well, of course Your Honor does, but the plain meaning of the statute is where we reside our argument and where we ask the Court to look. As the Supreme Court in the Pair case said, the plain meaning of legislation should be conclusive, except in rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters.

THE COURT: It is conclusive. In fact, if you look at Section 553, it says, "Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of this case" -- or "the case, except to the extent that," and there are a bunch of exceptions.

The rule is mutuality. Where does the exception override that rule?

MR. MONTGOMERY: Your Honor, we point to 561(a), because it is a specific provision governing a specific type of contract that says "shall not be stayed, avoided or otherwise limited by operation of any provision of this title", and we read that to include 56 -- 553 --

THE COURT: We're not talking --

MR. MONTGOMERY: -- or by any order of a court.

THE COURT: But, Mr. Montgomery, we're not talking about the stay; we're talking about the right. We're talking about the right to exercise offset. You can't exercise that right with respect to post-petition receipts. It's as simple as that.

MR. MONTGOMERY: But, Your Honor, I have to disagree with you, because why is -- why is, in bankruptcy jurisprudence, there a difference between what the debtor can be subject to immediately before the filing date and immediately after the filing date? And the issue is the automatic stay. The bankruptcy courts and thirty years of jurisprudence have said that the debtor that exists after the filing date is not the same entity that existed before the filing date, because if it were, mutuality would be a prima facie established fact.

So what's happening here? The debtor is saying we are relying upon the distinction between the pre- and post-petition debtor. We are saying that it's the same entity, because 560

and 561 tell us it can be the same entity, because no operation of the Bankruptcy Code can prevent the enforcement of the termination rights that arise under the swap agreement. And the parties explicitly agreed eighteen years -- actually fourteen years ago now -- under a -- using a master form agreement that was developed eighteen years ago, that setoff include the right of retention across other accounts. And, Your Honor, for us, it's a very straightforward and simple reading that is not contravened by any specific case law cited by the debtor. And to the extent 553 is the source of challenge, we say to the Court that the plain meaning of 560 and 561 precludes 553 from being used to achieve an adverse result.

THE COURT: Okay.

MR. MONTGOMERY: Thank you, Your Honor.

MR. KRASNOW: Richard Krasnow, Your Honor, on behalf of the debtors. I will be brief. First, what Mr. Montgomery referred to as a fiction is in fact the legal reality. There is a distinction between a debtor and a debtor-in-possession. There is a distinction between pre-petition funds and funds received by the post -- by the debtor-in-possession post-petition.

Secondly, just a factual correction: The setoff that Swedbank effectuated during those initial months of the chaotic Chapter 11 that was Lehman was 300-some-odd thousand kronor;

that translates to approximately 50,000 dollars. That's really what's not at issue here.

Your Honor, what we should look to in the con -- with regards to the mutuality issue is Section 553 and what did Congress do with respect to Section 553. If Mr. Montgomery is right and Sections 560 and 561 wrote out of the statute Section 553 in its entirety as it relates to safe harbor transactions, why is it that in 2005 Congress felt it was necessary to amend Section 553(b) so as to exclude from the avoidance provisions of Section 553 certain pre-petition setoffs that a counterparty may have exercised with respect to a safe harbor transaction? They did it because Section 560 and 561 didn't write out Section 553. It is a very limited carve-out of 553; it is limited to Section 553(b), not 553(a). There is simply no merit whatsoever to Swedbank's contention that they as a counterparty, or any other counterparty, can simply glom onto and take away from an estate any and all post-petition assets that it may realize.

Your Honor, again, we request that the motion be granted. Thank you.

THE COURT: Since Mr. Montgomery is no longer in front of the bar of the Court, I assume that he has nothing more to say.

MR. MONTGOMERY: That is correct, Your Honor.

THE COURT: The motion is granted. There are

principally two arguments being made here, although I haven't heard anything about argument number 2, except in passing. Argument number 2 is that it's inappropriate to exercise a right of setoff with respect to funds in a general deposit account that wasn't identified as arising under, in this case, a swap agreement. I'm not going to deal with that issue, largely because the parties, except in their papers, have dealt with it, but appear not to be focused on it for purposes of today's argument.

Additionally, there is another matter currently before the Court involving disputes between Lehman and Bank of America in which this issue is fully briefed, and there is a full record as a result. I will defer any consideration of that question to an adjudication of that separate dispute.

I believe that the issue is actually answered in the Court's decision in the DnB NOR case, which, while it did not deal with Section 560 or 561 of the Bankruptcy Code, dealt explicitly with setoff as it applies to post-petition funds deposited in an account, just like this account. The DnB NOR account was a general deposit account involving Norwegian krona. This is a general deposit account involving Swedish krona. The question decided in the DnB NOR case had to do with the timing of receipt of a wire transfer. This is much less subtle. This is money that is indisputably post-petition funds received after the petition date. And Swedbank somehow argues

that the traditional distinction between pre- and post-petition funds for purposes of construing mutuality under Section 553 should be disregarded simply because they exist, a fourteen-year old ISDA agreement relating to swaps between Lehman and Swedbank. I do not read Section 560 and 561 as overriding so fundamental a precept of U.S. bankruptcy law as the requirement that there may be mutuality for purposes of setoff. I do not believe that Section 560 and 561 can be read to override such a fundamental part of our law. And if Congress actually intended to do what Mr. Montgomery is today arguing, Congress would have said in clear, understandable and plain language that Section 553, to the extent it relates to mutuality, does not apply in circumstances of netting permitted under Section 560 and 561.

The strained argument made by Swedbank is unpersuasive, no case law or other authority has been cited to support the position being advanced here, and the Court grants the motion. To the extent that Swedbank should choose to seek further review of this bench decision, the Court reserves the right to prepare a more complete rendition of its determination for purposes of helping the district court consider the issue on appeal, should that be necessary.

We'll take the next matter, and I'll take an order at the end of the hearing.

MR. KRASNOW: Your Honor, we did not bring in the form of order with us, but we will submit one later this week.

THE COURT: Fine. In the form of order, please make reference to the fact that I reserve the right to file written findings and conclusions in connection with this in the event that any appeal should be taken.

MR. KRASNOW: We will do so, Your Honor.

THE COURT: Thank you.

MR. MONTGOMERY: Your Honor, if I may, because it relates -- in the event that the client seeks the appeal of this, we would request a stay of the order directing -- if the Court enters the order at the debtors' request and which is a direction to turn over funds, we ask that the Court consider a stay so that we may appeal Your Honor's decision.

THE COURT: There'll be a further proceeding with respect to the request for the stay. I'm not going to grant it based on your oral motion.

MR. MONTGOMERY: Thank you, Your Honor.

(Pause)

MS. MARCUS: Good morning, Your Honor. Jacqueline Marcus, Weil, Gotshal & Manges, for the Lehman debtors, including LCPI.

Item number 8 on the agenda, Your Honor, is the objection of LCPI to the proofs of claim filed by Latshaw Drilling Company, claim number 18346, in the amount of approximately eighteen million dollars.

LCPI's objection to the claim was dated January 22nd,

2010 and is docket number 6729 on the docket.

As the Court is no doubt aware from having read the pleadings, Latshaw Drilling Company and its affiliate are the subject of Chapter 11 cases that were commenced in the Northern District of Oklahoma in November 2009. Thus, this matter presents an issue which the Court has faced before of competing Chapter 11 cases.

LCPI's objection to Latshaw's claim had previously been scheduled for an earlier hearing but was adjourned to provide time for the parties to attempt to negotiate a global resolution of the issues. Unfortunately, that effort was not successful, so we're here today to discuss the objection.

The facts regarding the Latshaw credit agreement and LCPI's alleged failure to fund are set forth in our objection. Obviously, LCPI as the lender in this case, and Latshaw as the borrower, disagree about the facts and the impact that the facts have on their respective rights. However, both parties agree that Latshaw borrowed in excess of forty-five million dollars from LCPI.

For purposes of today's hearing, there are essentially four issues in dispute, all of which are legal issues: The first one is that this Court, as the court in which LCPI's Chapter 11 case was commenced, have jurisdiction to hear and determine claims filed against LCPI; second, did Latshaw waive its right to recoupment under the terms of the credit

agreement; third, did Latshaw waive its right to recover consequential or special damages under the credit agreement; and fourth, do the alleged damages suffered by Latshaw as a result of LCPI's failure to fund constitute consequential damages?

Turning first, Your Honor, to the Court's jurisdiction. 28 U.S.C. Section 157(b)(2)(B) makes it abundantly clear that the allowance or disallowance of claims against the estate is a core proceeding. Thus, this Court undoubtedly has jurisdiction to deal with the Latshaw claim. Latshaw argues repeatedly that it is not seeking affirmative relief against LCPI in this case, but only filed its claim as a defensive measure. Latshaw fails to note, however, that the relief it seeks is actually more costly to this estate than the allowance of a claim, because the effect of recoupment would be to provide recovery to Latshaw in one hundred cent dollars rather than in bankruptcy dollars. On the contrary, the outcome of this dispute would have less impact on the estate if the issue were merely the allowance of an unsecured claim against LCPI.

In any event, this Court, as the home court for LCPI's case, has the preeminent interest in the resolution of this dispute. Moreover, it is only this Court and not the Oklahoma court that is charged with exercising due care to ensure the equitable distribution to all creditors of the LCPI estate.

The case cited by Latshaw in support if its statement that the bankruptcy court should not act as a collection agency, couldn't be further from the facts at issue in LCPI's case. In In re Mountain Dairies, 372 B.R. 623, the case involved a single creditor attempting to file an involuntary Chapter 7 case against the debtor. In that context, Judge Morris determined that the court should not act as a collection agency for one creditor. If anyone is seeking to use the bankruptcy court as the collection agent, LCPI submits that is exactly what Latshaw was trying to do when it commenced its case in Oklahoma.

Indeed, Latshaw recently filed a Chapter 11 plan that purportedly would provide for payment in full with interest of all creditors with the exception of LCPI, whose claim Latshaw has sought to expunge in its entirety. Thus, Latshaw's Chapter 11 case, like the case in Mountain Dairies, is essentially a two-party dispute.

Latshaw argues and cites Judge Drain's decision in the Metiom case, that the determination of the LCPI claim and the amount of damages that Latshaw may recoup is properly a decision for the Oklahoma court. The Metiom decision, however, does not stand for that proposition. Rather in that case, the Court allowed the trustee for the first of three sequential debtors to litigate a claim objection in the court in which the first bankruptcy was filed. That case turned primarily on

whether the automatic stay was applicable to bar the claim objection, and the Court held that it was not.

Latshaw next argues that the true contest revolves around LCPI's claim against Latshaw, which, it submits, should be decided in Oklahoma. However, as referenced in LCPI's objection, there can be no right to recoupment if there is no underlying claim. The decision of a District Court for the Southern District of New York in In re Kings Terrace Nursing Home and Health Related Facility, 184 B.R. 200, is instructive.

In that case, the Court held as follows: "One thing is crystal clear. Whatever its foundations, there can be no recoupment unless there is an underlying right." The Court went on to note, "The broad definition of claim in Section 1015 performs a vital role in the reorganization process by requiring, in connection with -- in conjunction," excuse me, "with the bar date, that all those with a potential call on the debtor's assets come before the reorganization court, so that those demands can be allowed or disallowed, and their priority and their dischargeability determined."

Moreover, as indicated by the creditors' committee in its support of LCPI's objection, judicial economy would be promoted if this Court determines Latshaw's claim. If this Court determines that there is no claim against which Latshaw may recoup, then it's res judicata, and will be determinative when the Oklahoma court denies the allowance of LCPI --

decides, excuse me -- decides the allowance of LCPI's claim against Latshaw. If the Court determines that there is a claim against which Latshaw may recoup, then that would also be helpful to the Oklahoma court in allowing the LCPI claim. But if Judge Rasure in Oklahoma determines that recoupment is not appropriate, then the parties would be back here litigating over the amount of the Latshaw claim against LCPI.

As to the second issue, Latshaw's waiver of its right of recoupment, the key provisions of the credit agreement are set forth in our papers. There's Section 2.4(a), which sets forth Latshaw's unconditional promise to pay LCPI when amounts are due, and Section 2.9(d), which provides that all payments are to be made by Latshaw, without setoff or counterclaim. In both the LCPI objection and our reply, we have cited many cases that hold that recoupment is a form of counterclaim. Therefore, Latshaw's recoupment claim was waived as a result of Section 2.9(d) of the credit agreement. Latshaw does not offer any contrary authority. Instead it erroneously relies on the fact that Section 2.9(d) does not specifically use the word "recoupment."

Latshaw also argues that Section 9.18 of the credit agreement's waiver of jury trial makes it clear that counterclaims are to be allowed. However, Latshaw overlooks the distinction between having a counterclaim and being able to apply that counterclaim to reduce a repayment obligation under

the credit agreement.

In the unlikely event that the Court determines that Latshaw's alleged recoupment claim has not been waived, then LCPI reserves its right to claim that Latshaw's claim is not appropriate for recoupment. Indeed, the Second Circuit's decision in Malinowski, which is cited by Latshaw, indicates that it's not only a question of whether the claim arises from the same agreement, but the question is whether the obligations were independent of one another. The debtors submit that the language of Section 2.9(d) reflects that the obligations were, indeed, independent of one another and should not be subject to recoupment.

The third issue, Your Honor, is the waiver of consequential damages. Section 912 of the credit agreement includes a waiver of special or consequential damages. Latshaw has confirmed in both the affidavit of Trent Latshaw, filed on the first day of the Latshaw bankruptcy, and in its response to the LCPI objection, that indeed, consequential damages have been waived.

The fourth issue, Your Honor, then, is the nature of the damages asserted by Latshaw. The damages claimed by Latshaw are consequential or special damages, and they were, therefore, waived under the unambiguous terms of the credit agreement. Latshaw has confirmed the general rule cited by LCPI that nominal damages in the case of a breach of a contract

to loan money, consists of the cost of obtaining replacement financing. But that is not what Latshaw seeks here. Instead, it seeks to recover primarily expenses it allegedly incurred for equipment ordered for the construction of two new rigs.

The only dispute here seems to be how to characterize the damages that underlie the Latshaw claim and whether Latshaw has established that it is entitled to more than general damages. LCPI submits that Latshaw has not met that burden.

The case law does indicate that in certain circumstances parties would be entitled to additional damages in the event of a failure to fund, if those damages were foreseeable at the time that a credit agreement was entered into. Latshaw has not proven, nor could it, that the total shutdown of the credit markets that occurred following LBHI's bankruptcy was reasonably foreseeable, either at the time when the original credit agreement was executed in 2005 or in July 2008 when the amended credit agreement was executed. Thus, even under the cases cited by Latshaw, LCPI could not be charged with the consequential damages that Latshaw seeks to recover.

With respect to Latshaw's request that the Court allow it to withdraw its claim, as set forth in LCPI's reply, analysis of the four relevant factors courts look to in deciding whether to permit such withdrawal demonstrates that Latshaw should not be permitted to withdraw the claim. Those

factors are: the adequacy of the claimant's explanation for the need to withdraw; the extent to which the claim has progressed; the duplicative expenses of re-litigation; and undue vexatiousness on the claimant's part. I won't belabor LCPI's position on these points. They're all set forth in our reply.

Finally, Your Honor, with respect to those arguments made in Latshaw's surresponse, which was filed last night, we'd like to briefly note the following. Latshaw continues to perpetuate the myth that LCPI has admitted that it breached the credit agreement. This is a mischaracterization of paragraph 13 of LCPI's claim objection in which LCPI acknowledged that it failed to fund, but did not acknowledge that it breached the credit agreement.

THE COURT: But wasn't the failure to fund a breach of the credit agreement?

MS. MARCUS: Arguably, it was, Your Honor. However, we believe that there might be defenses available. For example, the previous pattern of draw requests by Latshaw was that amounts were requested as needed in two- or three-million dollar increments. On the day immediately following the LBHI bankruptcy, Latshaw made a request for the full thirty-seven million dollars. And we believe that LCPI may have a defense based on that.

Finally, Your Honor, last point. Latshaw seeks to

take unfair advantage of the examiner's report to argue that it should have the right to rescind the credit agreement on the basis that LCPI allegedly was insolvent in August 2008. Two points with respect to that. If Latshaw's going to attempt to rely on anything in the examiner's report, we believe that the correct court in which to do that is here in New York. And secondly, the solvency statements in the examiner's report aren't quite as straightforward as indicated in this surresponse.

Finally, Your Honor, LCPI submits that permitting Latshaw to recoup or indeed to totally avoid any repayment obligation to LCPI would provide an unfair windfall to Latshaw, and the Court should not entertain that.

For all of the foregoing reasons, LCPI requests that the Court determine that Latshaw has waived the right to recoup any alleged damages; that the damages represent consequential or special damages that have be waived; and disallow and expunge the claim.

THE COURT: Okay. I'll hear from counsel for Latshaw.

MR. BELMONTE: Does Your Honor want to hear from the creditors' committee counsel first, because they filed a statement in support of this.

THE COURT: Sure, I can hear from the committee first. Although --

MR. DUNNE: I'll make it quick. We rest on our

pleadings and --

THE COURT: That's great.

MR. DUNNE: -- your work here is done, Your Honor.

THE COURT: Thank you. Okay, we've heard from committee counsel.

MR. BELMONTE: Good morning, Your Honor. It's Christopher Belmonte from Satterlee Stephens on behalf of Latshaw Drilling.

I agree with quite a bit of what Ms. Marcus said, believe it or not. This does, in fact, bring up the unfortunate circumstance of competing bankruptcies, the Lehman bankruptcy here in New York, versus the Latshaw Drilling bankruptcy in the Northern District of Oklahoma. This alleged failure to fund, I think Your Honor put your finger right on it. It really isn't admitted. There's no defense been alleged. This is the first I've heard of anything even close to it. And in fact, at the time the funding request was made, Lehman -- and there was a response due from Lehman in three days, Lehman's participant funded its portion. Lehman remained silent -- absolutely silent for three months. So I think that's a canard, Your Honor, it's really not an issue.

I agree with what Ms. Marcus said about this Court having core jurisdiction. There's no doubt about it. This Court has core jurisdiction. I think the unfortunate situation here is that so does the court in Tulsa.

There's no question that LCPI failed to fund some twenty-eight million dollars, pursuant to a request. The issue is, who gets to decide the consequence of that failure to fund: Your Honor or the court in Tulsa? Lehman filed a forty-six million dollar claim in the Tulsa bankruptcy case. And, Your Honor, essentially what Lehman is asking Your Honor to do is to rule on its proof of claim in the Tulsa bankruptcy and to take that away -- in a sense to encroach upon the jurisdiction of the Tulsa bankruptcy court, when it's the largest single claim in that bankruptcy.

Your Honor, there are so many things that have to be administered in the Tulsa bankruptcy at any rate. For example, that forty-six million dollar claims includes an estimate of 500,000 dollars for attorneys' fees. The Tulsa court has to rule on the reasonability of that. Your Honor can't do that. It's not before Your Honor. It will before that court. 600,000 dollars in commitment fees for a commitment that was never funded is an issue that's going to be before Judge Rasure in Oklahoma, and not before Your Honor.

Therefore, Your Honor, we sought to withdraw this proof of claim without prejudice, because it was solely filed as a protective and informative matter. Your Honor heard earlier a setoff argument. This is a recoupment argument, which, as we all recognize, is different from a setoff. Recoupment arising out of the same transaction, does not

require a leave of bankruptcy court to be permitted. It does not require mutuality. This is pretty basic precepts that nobody can deny. And while I recognize that there's 66,000 claims, there could be 55,999, if Your Honor grants our request to withdraw it and to have this heard in the bankruptcy court in Tulsa, where we think it better belongs.

We don't believe that recoupment was waived, Your Honor, turning to the merits of this, if Your Honor decides to address this on the merits. The loan agreement is very lender-friendly, as most loan agreements are. Your Honor, will not find the word recoupment -- we searched for it -- anywhere among that -- among the recondite pages of that loan agreement. And with all the waivers -- and by the way, we concede -- it's not an issue before the Court -- we concede that we waived consequential damages. No issue about that. But what Your Honor is essentially being asked to do is rewrite the agreement to include something that the draftsman didn't, which was a waiver of recoupment. And this clearly falls within that recoupment issue, Your Honor.

Since we concede consequential and special damages were waived, the real issue is whether or not the damages that we allege -- and we're not alleging lost profits, which is consequential, and we say there's some forty-six million. That's not on the table. It's not been alleged here; it's not been alleged in Tulsa. Our point is that when the plug was

pulled on the funding, there were drilling rigs that were in the middle of construction, and they were left in media res, just like that. And they're sitting out in the field right now. And there's eighteen million dollars'-worth of that sort of equipment and expenses for that equipment, Your Honor.

We submitted evidence of that, hundreds of pages of invoices, that support that. If Your Honor is disposed to go through that and have that issue determined by Your Honor as opposed to Tulsa, we submit, Your Honor, that there's a disagreement as to whether these are consequential or incidental damages. We believe they're incidental damages. They claim that they are consequential damages.

And on that basis, Your Honor, we would oppose, on the merits, the objection to the claim. But our first request to Your Honor is that it be permitted to be withdrawn so that the court in Tulsa will not have an encroachment, if you will, on its jurisdiction in administering the plan of reorganization that Latshaw has filed. Thank you, Your Honor.

THE COURT: Thank you. Anything more?

MS. MARCUS: Just very quickly, Your Honor. The only point I'd like to make, Your Honor, is that we certainly are not seeking to encroach on the jurisdiction of the Oklahoma court. Latshaw filed a claim in this court, and apparently now has changed its mind as to that strategy. Our request is that the Court determine whether there is a valid recoupment claim

and whether the damages that LCPI asserted in its proof of claim filed here are the type that have been waived under the credit agreement.

If at the conclusion of the Court's ruling we need to go to Oklahoma to deal with the LCPI claim, as I believe that we will, then we are happy to do that. We are not suggesting that the Court rule here that Latshaw owes LCPI forty-five million dollars.

THE COURT: Okay. I don't think I have anything to ask you.

MS. MARCUS: Okay. Thank you.

THE COURT: I've looked at the papers in connection with this dispute, but this is not the first that I've heard of it. And I'm going to just mention this publicly that, believe it or not, bankruptcy judges, wherever located, often know one another. And I happen to know the bankruptcy judge in Tulsa who is responsible for this case, and we spoke about this case privately some time ago. It had to do with an unrelated matter, the use of cash collateral. And she called me and we spoke, because she was concerned about encroaching on my jurisdiction. None of that has anything to do with the matters presently before the Court today.

But of one thing I am absolutely certain, the Tulsa bankruptcy court is a very competent court to decide issues with respect to the loan agreement which is in dispute here,

and I believe is the proper forum for resolving disputes as between Lehman and this Chapter 11 debtor. There have been lots of nuanced legal arguments made as to whether this court or that court is the right court to decide questions regarding proofs of claim, but there's no dispute that there are two essentially parallel proceedings going on at the same time, with respect to either Latshaw Drilling's claim against Lehman or Lehman's claim against Latshaw Drilling. They are opposite sides of the same coin.

I, for one, believe that the proper forum is in Oklahoma. That court already is familiar with the issues relating to the loan agreement. That court already has at least one version of a plan of reorganization to consider. That court is perfectly capable of considering questions of waiver and recoupment and consequential damages, at least as capable of considering those questions as I am.

There's certainly no inconvenience involved to the parties. The parties are already represented in the Oklahoma proceeding. I can see no prejudice to Lehman in permitting the withdrawal of the proof of claim here, particularly in light of the fact that, as I understand from the papers, although it was at the time it was filed a bare proof of claim, as a result of document requests, the proof of claim was supplemented with additional information.

Furthermore, as to the underlying facts that give rise

to the recoupment claim itself, we've already talked about those facts here. There may be different legal consequences that flow from the facts, but it is acknowledged that a funding request made post-petition as to Lehman, was not honored. Whether or not there was an obligation to honor that request is a matter that's not presently before me; although this is one of those situations in which the facts, at least, appear to speak for themselves.

For the reasons stated, I consider this an appropriate matter to be resolved either by agreement or following litigation in the Tulsa bankruptcy court. And I will permit the Latshaw Drilling Company proof of claim to be withdrawn without prejudice, without prejudice both to Latshaw and without prejudice to Lehman. In effect, I am mooting debtors' objection to the proof of claim by permitting withdrawal by Latshaw without prejudice of its proof of claim. And I'll entertain an order that's consistent with those remarks.

UNIDENTIFIED SPEAKER: We'll settle one on counsel.

THE COURT: Okay, thank you.

MR. WAISMAN: Shai Waisman, Your Honor. The final matter on this morning's agenda is the debtors' motion for ADR procedures. I think most everyone involved in the case knows that these procedures are long coming. They were referenced as early as Bryan Marsal's state of the estate address on November 18th of last year, as well as again at the January 13th hearing

before Your Honor on claims procedures.

The motion itself was filed on March 15th, nearly a month ago, with an objection deadline of March 31st. I can say that almost immediately upon filing and the ECF notice going out, we received any number of telephone calls from parties-in-interest with questions, with requests, with language changes. And in addition to those numerous parties that contacted us, we also had twenty-eight objections filed on the docket in response to the motion.

Our general approach, Your Honor -- I'll spend a few minutes on this ,because I think it's important. Our general approach was to meet with all of those that wanted to meet; speak to everyone that wanted to speak; provide drafts as we were revising the procedures to all those that requested drafts and had filed objections. The parties we engaged are numerous. They're listed in our -- the reply that we filed in long form. But they included a working group of LBSF creditors. They included Citibank in its various capacities in this case; Barclays in its capacities in this case; the government, in the form of the IRS and the U.S. Attorney's Office; Fannie Mae; Freddie Mac; and the numerous objectors.

And as I indicated, we've been negotiating with these parties since the filing of the motion and up through the commencement of this hearing, both in the hallway and during the hearing by BlackBerry, thanks to the Court's new rules on

BlackBerry usage in the court.

THE COURT: That's an unintended consequence.

MR. WAISMAN: But a beneficial one, I assure you, in this context, Your Honor.

Nobody got everything they wanted by way of these procedures, and that includes the debtors. But I think, at the end of the day, nearly everybody was comfortable with the final draft form that was filed on the docket last night. And to borrow Your Honor's phrase, perhaps this is the sequel to the coalition of the willing.

Twenty-eight objections were filed, and numerous informal objections were received with extensions of deadlines. The informal objections have all been resolved. None of those parties felt the need to file an objection. Of the twenty-eight objections that were filed, I think this morning's amended agenda reflected that we had resolved nineteen of those objections. In fact, as we stand here, I believe we have resolved no fewer than twenty-one, perhaps twenty-two. And just to reference the agenda itself, under item 9, "Responses received", C and D, the objections of Standard Chartered Bank and of BRE Bank have been resolved. And depending on how well I do in the rest of my presentation, I think we hope that H, the objection of the LBIE administrators is resolved. And with that, perhaps one or two others. But again, it will depend on some of my comments to follow.

A few statements --

THE COURT: How many --

MR. WAISMAN: -- on the record --

THE COURT: -- just one question. How many live objections do we have at this point?

MR. WAISMAN: I believe we have six. I'm not sure that those six are all pressing their objections or intending to speak. Certainly a few of them are here and intending to speak. I think there are a number of parties who have requested some clarifying statements. And as I indicated, depending on what I say, they may or may not want to supplement the record.

THE COURT: All right.

MR. WAISMAN: So a few statements on the record. First, nothing -- as is clear in the motion and the order and the procedures, nothing in the order or the ADR procedures state or imply or intended to imply that ISDA agreements have no force and effect. It goes without saying, and certainly Your Honor states it repeatedly, but to the extent a mediation is not successful, all parties' rights in connection with the claims objections and the hearing on claims objections are fully preserved -- the claimants' rights and the debtors' rights, fully preserved without prejudice.

As to the mediation itself -- and we've inserted a provision that the parties can agree that mediation, where

appropriate, will occur by telephone. Anyone involved in mediation knows that there's a strong preference for mediation to occur face-to-face, around a table, where folks can roll up their sleeves and actually have an honest dialogue, and that becomes much harder on the telephone. We have told parties, and we will state again here today, that we will not deny requests for telephone mediations in any punitive manner, where it makes sense for a mediation to occur by phone. For example, where the claim is small and the party is located a far distance, we will entertain those requests in good faith.

Again, the preference is always to have mediations face to face, but certainly the circumstances have to be taken into account when a request to have a telephonic mediation is received. And the debtors assure parties that those requests will be taken into account in light of the circumstances.

Finally, as to the LBIE administrators. The ADR procedures, as Your Honor is undoubtedly aware, include a temporary litigation injunction. The relationship with the LBIE administrators, despite some of the back-and-forth that Your Honor is aware of, has been very, very productive, and continue to work together very, very closely. There is nothing in the ADR procedures or in the temporary litigation injunction that was intended to or designed to put a halt or otherwise impact the administration of those cases.

Certainly the LBIE administrators made a decision to

file claims in this case. And I think they're well aware of the jurisdictional implications of filing those claims and the fact that they are subject to the jurisdiction of this Court and the claims resolution process. And I don't think there's any dispute there. The overlay of ADR and the temporary litigation injunction is not intended to disrupt the administration of those cases. It is a limited injunction that deals with discovery related to the subject of the proof of claim that is being objected to, and therefore is the subject of the ADR procedures.

I think the LBIE administrators, as best as I can explain to the Court, are concerned with -- while I may be able to state this in black and white terms, are concerned about the gray; and that when rubber hits the road and there is -- needs to be an objection, and an ADR notice is filed, that there may be questions as to what exactly is or is not implicated by the temporary litigation injunction as it relates to the administration of the cases. And we have assured the LBIE administrators that if and when that happens, we will work with them -- we could agree to the scope of the injunction so as to not unnecessarily burden the administration of those cases, while permitting us to stay discovery and litigation on the very claims that are the subject of the proof of claim, and advance an ADR.

And of course, to the extent we cannot agree, and

there is an issue that requires the Court's intervention, the Court has certainly made itself available, both in mediation-style chambers conferences as well as on the record, to assist parties in resolving those disputes. And we would be amenable to coming to Your Honor, should there be an impasse.

That's how we would approach the LBEI administrators' concerns. Counsel is here. And to the extent that wasn't sufficient or additional information should be shared, I'm sure he'll speak up.

That leaves, Your Honor, as I indicated, roughly four to six objections. I think they fall into two categories. One, that claimants should be able to take discovery in some formal discovery protocol prior to and in connection with mediation. And two, as to the foreign administrators -- and here the Hong Kong administrators and the LBIE administrators -- that the temporary -- that the ADR procedures either shouldn't apply to them at all, or that the temporary litigation injunction shouldn't apply.

As to the first, being discovery, and the request here is one that we spent a lot of time on with all of the parties that we spoke to and all of the parties that we ultimately reached agreement with as to the form of procedures that do not include any compulsory discovery on either party's side, go to the essence of why we have ADR and mediation in particular, to begin with. Mediation is not litigation. It is meant to avoid

the time, the expense, the adversarial nature of litigation. And it is a process where both parties have to be interested and willing to mediate. And by that, I mean, there has to be buy-in to the process.

If a party is asked to settle a claim and it does not believe that it has been provided information or adequate information to enable it to assess that claim, there is no binding nature to the mediation. It is free to walk away. So both parties are incented to share information as required to make the other comfortable that the mediation is level and the process fair and the settlement right. And if either party is not made comfortable, the answer is clear. Mediation fails and the claims dispute process before this Court proceeds.

In this case, more than any other, mediation, we believe to be a necessity. With the range of magnitude of claims that I outlined for the Court at the beginning of the hearing, an inability to resolve many claims and many claims quickly, will likely lead possibly to delayed distributions to many, many claimants, and perhaps delayed distributions to all claimants, for a very long time. There's only so much time that this Court has to entertain one-off litigations as to 66,000 claims.

So we, the debtors, reject any notion that compulsory discovery plays any part in mediation -- that is reserved for claims litigation -- and remind the parties that there has to

be buy-in, and both parties need to work together to make the other comfortable that the necessary information is available and is shared so that settlement can be reached.

As to the administrators' objections. I'm hopeful that my statements have resolved or gone a long way to resolve the LBIE administrators' concerns. And as to the Hong Kong administrators, I'll start off by saying what I think most involved with the case know: the relationship with the Hong Kong administrators is excellent. The parties work together very closely, have had an excellent working relationship on the global protocol. And there's every indication that that relationship will continue.

That said, I think the administrators' objection goes to great length to suggest that these procedures are somehow the entitlement to interpose a claims objection and that the administrators shouldn't be subject to any claims objection. Of course it's not these procedures, it is the Bankruptcy Code, the Bankruptcy Rules, that give the debtors the right to interpose claims objections. And all we seek to do here is overlay a nonbinding mediation process, should the parties fail to agree as to issues under the global protocol or otherwise, and prior to commencing any litigation. And should the Hong Kong administrators not believe in that process, they are free to attend and express an interest to proceed straight to litigation.

The other portion of the objection, I think, is spent explaining that certainly nothing in this court or in the ADR will resolve the claims that the debtors here have interposed in the Hong Kong administration. And that's absolutely true. Nothing in these procedures is meant to encroach on the jurisdiction of the Hong Kong court. Of course, one of the results of the great relationship, the working relationship and the conversations taking place now, or the ADR itself, the mediation itself, is that the parties could agree as to both claims, and that would be a very beneficial result. And there's nothing to preclude that from happening.

So all we see here is a nonbinding process to encourage the parties to talk, share information, and resolve their disputes, without the intervention of this Court. And that is, in many ways, the essence of the global protocol itself, and not at all in contradiction with the global protocol. So we see no reason to carve anyone out of these ADR procedures, and certainly hope there's no reason to employ them. But they should be available should we not be able to reach resolution.

With that, we filed our reply yesterday evening. I think many of the objections we addressed in there have been mooted. But certainly some of them remain and we'll hear from the objectors. The black-line that we filed with the motion remains the black-line. No further revisions have been made.

And that black-line, as indicated in the papers, was shared in its various iterations, over time, with any number of the parties.

I, on behalf of the debtors, express great, great appreciation for the manner in which this was approached. And this was a lesson, perhaps, off of the bar date motion, but one which I think we were all well-served to adhere to. And I think the result is a good one that will be for the benefit of these cases. And of course, the creditors' committee sort of had the first go at the procedures in terms of comments and suggested modifications, and from there was involved and updated throughout the process. And we thank them for their help on this.

I don't think there's any reason to go chapter and verse through the various changes. I'm happy to answer any questions Your Honor may have. Otherwise I would cede the podium to see where we are in terms of remaining objections.

THE COURT: Okay. That's a very helpful summary. And I appreciate the response that was submitted late yesterday along with a chart providing an update on the status of the various objections.

Before hearing from the objectors who still wish to press their points today, I want to be really clear on something. We are going to have alternative dispute resolution procedures. And the objections, to the extent that they are

going to the applicability of these procedures to a particular party, those objections are overruled. You are not going to get any special carve-outs. There won't be any. These will be universal procedures.

To the extent that there is still some value in tweaking what's here, I think that everybody's time would be better spent in the tweaking process as opposed to trying to make noise that I'm not inclined to listen to. That doesn't mean you won't get a fair hearing. I'm telling you now that you're going to lose. But you'll have a fair hearing and then lose.

So this is one of those situations in which the problem sort of mandates the outcome. This is, as noted in the Lehman claims summary presentation that Mr. Waisman made earlier today, this is an administrative problem of quite literally global proportions. The claims that are to be resolved are not only massive in number, many of them are extraordinary in size and complexity. And we need a process that allows for a winnowing down of those claims to manageable numbers, particularly as it relates to any objections that truly can be resolved through a consensual process.

What happens after that process has run its course is something else to be addressed at another time. And to state the obvious, I'm already in my sixties. And as a result, you're not dealing with somebody who is likely to survive the

final resolution of every one of these objections, if they're all litigated. It is demographically impossible. So we need a process; one that works, one that's fair, one that has been produced to the greatest extent possible, with the input of those who are fairly representative of those adversely affected, to the extent there's any adverse effect, so that, to paraphrase Mr. Waisman's words both in his papers and made today, this is a bit of a camel. It's the product of a committee. It is, as a result, probably imperfect in multiple ways. But it's more perfect than not having procedures. And so we're going to have them.

I'll listen now to any of the objectors who wish to be heard. But I truly believe that everybody's time would be better spent in some attempt to accommodate one another, perhaps over the lunch hour. And if accommodation is not possible, I'll hear why. So I'll start now by hearing anybody who still wants to press their objections and provide some good reason why --

MR. SHAFFER: Good morning, Your Honor.

THE COURT: -- you think you're so exceptional.

MR. SHAFFER: Andrew Shaffer from Mayer Brown representing Edward Middleton, the Hong Kong agent liquidators. I understand you've ruled on the essence of our objection. I just wanted to rise to echo virtually everything we heard from the debtors that the relationship is ongoing, and we look

forward to working productively to resolve the disputes in various claims and assets, and hopefully not in the context of these ADR procedures.

THE COURT: Okay.

MR. SHAFFER: Thank you.

MR. SZYFER: Your Honor, Claude Szyfer from Stroock & Stroock & Lavan, on behalf of certain derivative counterparties. We don't oppose mediation, and we support it. And our suggestion was, we thought, something that would make the mediation proceedings a bit more fair; and which was to try and equalize the information between the parties. We derivative counterparties have uploaded our transaction information through the derivative questionnaire process, and debtors have all of our calculations. We don't have the debtors' calculations. If the mediation is going to be meaningful, and we support meaningful mediation, and if the mediation is going to have an opportunity to really succeed and winnow down so many of these derivative claims, it's going to make it a lot easier for the claimants if they know what the amounts are that the debtors think are in dispute.

And we had discussions with the debtors. And our suggestion was, where there are transactions where there are disputes, let the debtor provide us with their calculations for those transactions. I have many clients that have already engaged with the debtors and have been providing, voluntarily,

information with the debtors. We have not gotten any individual transaction detailed information from the debtors with respect to those claims.

Our suggestion is really simple. If the mediation has a chance to succeed, if the parties are going to engage in a four-month process where they're going to go over the number -- because that's what these mediations are about, and Mr. Waisman's papers specifically set forth that the calculations are central to the mediation -- then we should have an opportunity to at least see those numbers where the debtors dispute our calculations. Thank you.

THE COURT: Okay.

MR. FLICS: Your Honor, Martin Flics of Linklaters LLP, for the joint administrators of LBIE and the other UK administration companies. I will be brief.

I appreciate Mr. Waisman's remarks. We had a productive discussion, and several discussions, I believe. Our concerns do not and did not go to the core and the merits of this procedure, which we think are laudable. Whether or not they apply to particular cases or not, is not an issue for today. We think they're appropriate. Our concern was really the law of unintended consequences, I believe.

We have, in fact, been able to have two very complicated cases in different jurisdictions run pretty smoothly without conflict for jurisdiction. Our concerns were

that by adding another injunction in addition to the automatic stay -- and of course, we are aware that we filed claims that have certain consequences, that that might have some additional meaning and upset that balance.

And therefore our suggestion in the papers was that we, with respect to those foreign proceedings, be carved out not to be carved out from the idea of discovery or from the procedures, but just recognizing that the existing stay and our claims have -- are what they are, and those are principles that we understand, not to introduce another element.

Mr. Waisman's comments are helpful. I think, in fact, from our perspective, I don't believe the temporary injunction really adds anything from that perspective. There is the stay. We understand that. We know there are limits on that. Your Honor heard the Shinsei Bank application months ago. They're very complex. They are very fact-specific. And we're prepared to rely on that.

We would have preferred that there be a specific carve-out, but we think at this point, based on your comments, based on Mr. Waisman's comments, it's probably a distinction without a difference, and we respect and we appreciate Mr. Waisman's remarks about the intent of these provisions, which in fact had no intent to impact negatively our ability to pursue our proceedings in the UK. Thank you.

THE COURT: Okay.

MR. MALEK: Good afternoon, Your Honor. My name is Paul Malek. I'm the general counsel of Stonehill Capital Management. We have filed derivatives claims arising under pre-petition derivatives contracts between our funds and Lehman.

I echo what's been said before. We appreciate the changes that the debtors have made and we think they go a long way towards addressing our concerns. There's one very specific issue that hasn't been addressed and really hasn't been modified in the order that I just wanted to raise, and that is that the proposed procedures provide basically for the debtors to select a list without limit chosen from the register of mediators and present that to the claimant, and the only input of the claimant in that process in the selection of a mediator is the ability to strike three of the proposed mediators.

And we believe that it's very important in this process, given the complexity of the derivatives claims that there be at least some more substantive input from the claimant in the selection of the mediator. And the complexity of the claims is not necessarily tied to the size of the claims. I know there's a distinction made between large, complex derivatives claims and other claims.

And just to echo what Mr. Waisman said, we agree that it's important for both the claimant and the debtor to buy into the process. And we think that that would be facilitated by --

we would prefer to have the selection of the mediator consistent with what's in the ADR -- standing ADR procedures order, on mutual consent, or at a minimum, have the list of mediators that the debtors can propose be limited -- obviously taken from the fifty or so mediators that are attached, but have that be limited. We think that would enhance the process and be fair and make it more productive. Thank you, Your Honor.

THE COURT: Okay. Thank you.

MS. REID: Good afternoon, Your Honor. Maureen Reid from Baker Botts, on behalf of LINN Energy.

We join in Mr. Szyfer's comments with regard to getting towards a more meaningful mediation process by the sharing of information. And so we'd ask for some limited discovery that we don't think would burden the debtor in any overwhelming way, by third-party subpoenas, very limited, going towards market and pricing information and compulsory document production between claimants and debtors. Thank you.

THE COURT: Okay. We seem to have exhausted the supply of objectors.

MR. WAISMAN: Your Honor, Shai Waisman. Let me maybe address those briefly. I -- just going down the responses received and still outstanding on page 5 of the agenda. The first one was the Hong Kong administrators. And we appreciate their comments and we look forward to continuing the very good,

productive relationship. And I think that is largely resolved.

B is the objection of the derivative counterparties. And that's the suggestions interposed by Mr. Szyfer and the attorney for LINN Energy just now as to discovery in connection with mediation -- limited discovery, but it should include document discovery and third-party subpoenas. I don't know the basis for third-party subpoenas in -- I don't know the basis for discovery in connection with any mediation. If we think about the practical reality and how this is going to play out --

THE COURT: You don't need to belabor the point.

MR. WAISMAN: I won't belabor the point.

THE COURT: There's not going to be any discovery. However, in order for the mediation to work, the mediator needs to have the capacity to request that there be a sufficient sharing of information so that the mediation has a chance of succeeding. And it goes without saying that without good-faith sharing of information, it's impossible to reach a compromise.

MR. WAISMAN: And we will have wasted our time and our resources. And right to Your Honor's comments, the changes that we worked and arrived at, together with the help of many of the counterparties, are reflected in the black-line in paragraph D on page 7 of the revised procedures in the black-line that was filed.

We didn't hear from -- C and D on the "Responses

received" were resolved prior to the hearing. E and F, Wells Fargo and ABC Assicura, I'm not sure we heard of, so I'm not going to address -- heard from. We're not going to address those. I think Mr. Flics and I are in a meeting of the minds.

And that leaves, finally, the joinder of Stonehill. The joinder of Stonehill was a joinder -- a one-page joinder to the objection of Optim. We worked with the attorneys for Optim to resolve their objections, and they withdrew the objections, so I'm not sure what is being joined. I will say, the mediators are all nationally-recognized mediators that we collected with the input of many of those experienced in mediation. We received input from not only the creditors' committee but a number of the other parties we were working with in devising that list.

The reason for a large list is a large number of claims as well as there are only so many matters that any one mediator can handle in the Lehman cases in addition to their other workload, and leaving room for conflicts. Many of these are large institutions that we would be mediating against, and we see the possibility of many conflict situations.

So I think the mediator list is fair. It is a list of nationally-recognized mediators. I think if folks go back to their colleagues that mediate on a regular basis, they will recognize virtually every name on that list. And the procedure for selecting mediators was, again, negotiated and vetted with

the various working groups, and enables parties to strike mediators that they're not comfortable with, while leaving room for the debtors to find mediators who have the time and are conflict-free.

I have nothing further.

MR. SZYFER: One quick point, Your Honor. Mr. Waisman mentions the changes that were made, in particular, to Section D of the procedures, which does allow a party to request information. The problem with it is that the party who's being requested doesn't have to provide it. And that, to me, is the problem here.

THE COURT: Let me make myself as clear as I can make myself. When I said there's going to be no discovery, there's going to be no discovery. There will, however, be a good-faith sharing of information. The discovery that you request is completely inconsistent with what amounts to a litigation stay. This is not a form of litigation. This is a form of alternative dispute resolution that is intended to work and is predicated upon the good faith of all parties participating in it.

I can't order parties to act in good faith, but there will be consequences for those parties who don't. We're adjourned till two. The order is entered as modified.

(Proceedings concluded at 12:25 PM)

I N D E X

R U L I N G S

I N D E X (cont'd.)

R U L I N G S (cont'd.)

C E R T I F I C A T I O N

I, Clara Rubin, certify that the foregoing transcript is a true and accurate record of the proceedings.

Clara Rubin

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Date: April 16, 2010